

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Barry O'Brien et al.
Patent No. : 7,488,343
Issue Date : February 10, 2009
Serial No. : 10/664,679
Filed : September 16, 2003
Title : MEDICAL DEVICES

Art Unit : 3734
Examiner : Vi X Nguyen
Conf. No. : 4092
Adjustment Date: 09/28/2009 CKHLOK
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09/28/2009 CKHLOK 00000021 061050 10664679
01 FC:1455 200.00 DA

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPLICATION FOR PATENT TERM ADJUSTMENT UNDER 37 C.F.R. § 1.705(d)

Patentee hereby requests reconsideration of the Patent Term Adjustment (PTA) accorded the above-referenced patent. Reconsideration of the final PTA calculation to increase total PTA from 762 to 1085 days, is respectfully requested.

REMARKS

"A Delays" are defined as delays by the U.S. Patent and Trademark Office (PTO) under 35 U.S.C. § 154(b)(1)(A), which guarantees prompt PTO response. "B Delays" are defined as delays by the PTO under 35 U.S.C. § 154(b)(1)(B), which guarantees no more than three year application pendency. To the extent that the periods of delay overlap, the period of any term adjustment shall not exceed the actual number of days the issuance of the patent was delayed. 35 U.S.C. § 154(b)(2)(A). As outlined in Wyeth et al. v. Jon W. Dudas (580 F. Supp. 2d 138; 88 USPQ2d 1538), the only way that these periods of time can "overlap" is if they occur on the same day. If an "A delay" occurs on one calendar day and a "B delay" occurs on another calendar day, they do not overlap and 35 U.S.C. § 154(b)(2)(A) does not limit the extension to one day. Id.

The PTA for the instant patent, as currently calculated and shown on the face of the patent, apparently relies on the premise that the application was delayed under 35 U.S.C. § 154(b)(1)(B) *before* the initial three-year period expired. The Wyeth v. Dudas court determined that this construction cannot be squared with the language of 35 U.S.C. § 154(b)(1)(B), which applies "if the issue of an original patent is delayed due to the

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I hereby certify that this paper was filed with the Patent and Trademark Office using the EFS-WEB system on this date: April 9, 2009

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Terminal Disclaimer

This patent is not subject to a terminal disclaimer.

Conclusion

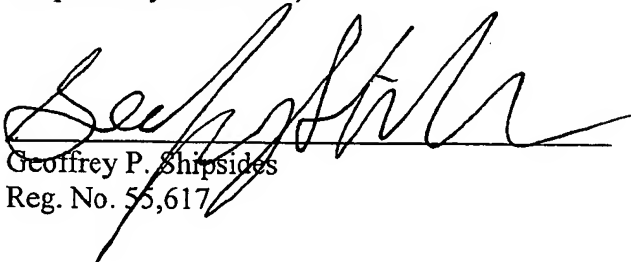
In consideration of the events described above, Patentee believes the PTA calculation of 762 days is incorrect. As such, Patentee respectfully requests reconsideration of the PTA in the following manner:

- 1) Total PTO Delay should be calculated as 1,086 days (i.e., the sum of 763 days of "A Delay" and 410 days of "B Delay" minus the 87 days of overlap);
- 2) Total Applicant Delay should be calculated as 1 day; and
- 3) Total PTA should be calculated as 1,085 days.

The fee of \$200 required under 37 C.F.R. § 1.18(e) is being submitted herewith. Please apply any other required charges or credits to Deposit Account No. 06-1050, referencing attorney docket number 10527-0462001.

Respectfully submitted,

Date: 4/9/09


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